IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
PRESIDING JUDGE RICHARD A. GRIFFIN

GARY and KATHY HENRY, et al.	Supreme Court No. 125205
Plaintiffs / Appellees,	Court of Appeals 251234
vs.	Saginaw County Circuit Court
THE DOW CHEMICAL COMPANY	Case No 03-47775-NZ
Defendant / Appellant.	

BRIEF OF PLAINTIFFS / APPELLEES

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF JURISDICTION

Plaintiffs agree that under MCR 7.301(A)(2) this Court has jurisdiction pursuant to its June 3, 2004 Order, which provided that "[t]he application for leave to appeal the October 29, 2003 judgment of the Court of Appeals is considered, and it is GRANTED." Plaintiffs, like defendant/appellant The Dow Chemical Company ("Dow"), understand that this Court seeks to determine whether a claim for medical monitoring is recognized in Michigan. Plaintiffs, and presumably Dow, agree this Court should resolve this issue, although Plaintiffs feel a full factual record and an opinion from the Circuit Court and the Court of Appeals would prove beneficial in making this determination.

COUNTER-STATEMENT OF THE QUESTION INVOLVED

1. Should this Court recognize an equitable claim for medical monitoring?

The Court of Appeals:	Did not address this question.
The Circuit Court:	Postponed a decision until a factual record could be developed.
Dow Answers:	No
Plaintiffs Answer:	Yes

COUNTER-STATEMENT OF FACTS

Plaintiffs include a counter-statement of facts because Dow's statement of facts omits numerous facts and allegations material to Plaintiffs' argument. *See* MCR 7.212(D)(3)(b).

I. NATURE OF THE CASE

Plaintiffs, owners and residents of property located within the 100 year flood plain of the Tittabawassee River in Saginaw County, Michigan (the "Flood Plain"), filed this action on behalf of themselves and two classes of similarly situated individuals in response to Dow's contamination of the Flood Plain with dioxin, an admittedly dangerous toxin and carcinogen. Recent tests conducted by the Michigan Department of Environmental Quality ("MDEQ") have found as much as 7,300 parts per trillion ("ppt") of dioxin in the Flood Plain, which substantially exceeds the current Michigan clean up standard of 90 ppt for direct residential contact. Compl. ¶ 117, DR:252a.[1] Plaintiffs seek to recover monetary damages for reductions in the value of their real properties, as well as the establishment of a court supervised medical monitoring program for those individuals whose health is determined by qualified medical experts to be at risk from dioxin contamination. Plaintiffs do not seek any lump sum payment of estimated medical monitoring costs as damages. Compl. *ad damnum*, DR:274a-275a.

A. Dioxin is a Hazardous Toxin.

Dioxin is a term used to identify a number of chemical compounds from three closely related families: polychlorinated dibenzo-*p*-Dioxins ("CDD"), polychlorinated debenzofurans ("CDF"), and polycholrinated biphenyls ("PCBs"). Compl.¶ 118, DR:252a. Compounds within these three families have varying toxicity – 7 of the 75 CDDs, 10 of the 135 CDFs, and 12 of the 209 PCBs are highly toxic. Compl.¶¶ 119, 121, DR:252a. These 29 different CDDs, CDFs, and PCBs all exhibit

[1] Citations to the record are abbreviated as "DR" for Dow's Appendix and "PR" for Plaintiffs' appendix.

similar toxic effects. *Id.* The term "dioxin" as used throughout this brief refers only to those 29 toxic dioxins.

Dioxin accumulates in the fatty tissues of animals and humans who consume contaminated water, plants, and soil, and who inhale contaminated soil and dust. Compl. ¶ 135, DR:257a. Dioxin also accumulates through the food chain. *Id.* The Flood Plain residents have been exposed to dioxin through all of these routes.

Medical research has demonstrated that exposure to dioxin can cause a number of serious diseases and severe health effects, including cancer, liver damage, hormone changes, reproductive damage, miscarriages, birth defects, and decreased ability to fight infection. Compl.¶¶ 128-134, DR:254a-255a. Dioxin exposure, even at very low concentrations, seriously disrupts normal reproduction in humans. *Id.* ¶ 131, DR:255a.

Medical research further demonstrates that developing fetuses and children are even more significantly affected by dioxin exposure. Compl. ¶¶ 131, 132, DR:255a. Dioxin adversely affects the developing immune, reproduction, nervous, and lymph systems, interferes with the production of many different hormones, growth factors, and enzymes, and causes many serious birth defects. Compl. ¶¶ 128-134, DR:254a-255a.

B. Dow's Dioxin Poisoning Was Discovered By Accident.

General Motors ("GM") accidentally discovered Dow's dioxin contamination of the Flood Plain when GM tested soil samples from a farm field near the confluence of the Tittabawassee and Saginaw rivers. Compl. ¶ 136, DR:257a. As it must, GM reported the test results to the MDEQ. *Id.* In December of 2000, the MDEQ confirmed the presence of significant concentrations of dioxin in Flood Plain soil. *Id.* In April of 2001, MDEQ field staff undertook further dioxin sampling and testing in a "Phase I Environmental Assessment." Compl.¶ 137, DR:257a-258a. These tests confirmed the presence of high levels of dioxin and identified dioxin concentrations as high as 7,300

ppt. *Id.* The data from these tests, however, was not released to the public until February of 2002. Compl. ¶ 138, DR:258a.

From April to June of 2002, the MDEQ conducted broader testing of the Flood Plain in what it called the "Phase II Environmental Assessment." Compl. ¶ 139, DR:258a. The results of these tests, together with the results of testing in a separate study by the Waste Management Division of the MDEQ, established conclusively that highly dangerous levels of dioxin are present in the Tittabawassee River and the Flood Plain downstream of Dow's facilities in Midland, and that Dow is the source of the pollution. *Id.*

The Phase II testing revealed very high levels of dioxin at the Freeland Festival Park and the Imerman Park in Saginaw, Michigan. Compl. ¶ 140, DR:258a. Both of those parks now have numerous signs warning visitors that the parks are contaminated with dioxin and that "children may be especially sensitive to dioxin...." *Id.* Similar warnings have been sent periodically to all residents of the Flood Plain beginning in the spring of 2002. Compl. ¶ 141, DR:258a-259a. Indeed, the MDEQ, together with the Michigan Department of Community Health ("MDCH") and the Michigan Department of Agriculture, has widely circulated a flyer entitled "Dioxins Fact Sheet." *Id.* These flyers have been mailed to all Flood Plain residents. Among other things, the Dioxins Fact Sheet warns that "Children should not play in soil or sediment near sites of known or suspected dioxin contamination." *Id.*

C. The Extent of the Dioxin Contamination Requires State Action.

In June 2003 the MDEQ issued its Final Report, Phase II Tittabawassee/Saginaw River Dioxin Flood Plain Sampling Study (the "Final Report"). Compl. ¶ 143, DR:259a. The MDEQ concluded that "elevated dioxin concentrations were pervasive" in the Flood Plain downstream of Dow's Midland plant, and that Dow "is the principal source of dioxin contamination" in the Tittabawassee River and Flood Plain. *Id.* Based on the findings in the Final Report, the MDEQ

warned that properties located within the Flood Plain downstream of Midland could be regulated "facilities" under Part 201 of Michigan's Natural Resources and Environmental Protection Act ("NREPA"). Compl. ¶ 144, DR:259a. MDEQ has invoked NREPA to restrict plaintiffs' outdoor activities on their property, to require plaintiffs to obtain state permits for all major household soil movement activities, and to compel plaintiffs to disclose all available information about area dioxin contamination to potential buyers under penalty of law. Compl. ¶ 145, DR:259a.

The breadth and scope of the testing which has been done establishes that dioxin contamination within the Tittabawassee River and Flood Plain is widespread and pervasive. Compl. ¶ 147, DR:259a. Indeed, recent testing has established that dangerous levels of dioxin exist to depths in the soil of up to four feet beneath the surface of the Flood Plain. Compl. ¶ 146, DR:259a. Dow has known of the presence of dioxin in the Tittabawassee River, and that it is responsible for the presence of that dioxin pollution, since at least as early as 1984, Compl. ¶ 150, DR:260a, yet Dow has done nothing to remove the contamination. *Id.*

The presence of dioxin in the Tittabawassee River and Flood Plain poses a serious risk to the health of the plaintiffs and other residents of the Flood Plain, requiring that they closely monitor their health for many years to come, if not the rest of their lives. Compl. ¶ 153, DR:261a.

II. THE PROCEEDINGS BELOW

Plaintiffs commenced this action in the Circuit Court of Saginaw County on March 25, 2003, and moved for certification of two distinct sub-classes on June 23, 2003. The first proposed sub-class consists of property owners within the Flood Plain and seeks an award of damages to compensate for the lost property value resulting from the dioxin contamination of their property. Compl. ¶ 156, DR:261a. The second sub-class consists of people who reside or have resided in the Flood Plain from 1984 to present. Compl. ¶ 157, DR:261a. This second proposed sub-class seeks the creation of a court-controlled equitable medical monitoring program that will supervise and pay

for medical screening made necessary by exposure to Dow's dioxin. Dow's resistance to Plaintiffs' medical monitoring claim generated this appeal.

Dow moved, pursuant to MCR 2.116(C)(8), for summary disposition of Plaintiffs' claim. DR:34a-53a. On August 18, 2003, the Circuit Court denied Dow's Motion for Summary Disposition of Plaintiffs' medical monitoring claim, DR:157a-161a, stating in pertinent part:

> The Court believes that Plaintiffs should be given the opportunity to create a record regarding medical monitoring damages. Therefore, Defendant's Motion for Summary Disposition as to Medical Monitoring is denied at this time without prejudice to Defendant raising it at another time after Plaintiffs have had an opportunity to develop the record as to this issue.

DR:160a. The Circuit Court later denied Dow's Motion for Reconsideration on September 10, 2003, DR:173a, and on September 26, 2003, denied Dow's Motion for Stay of Proceedings.

On October 1, 2003, Dow filed with the Court of Appeals its Motion for Peremptory Reversal and Emergency Application for Leave to Appeal. DR:348a-376a. Dow's Motion and Application were both denied by the Court of Appeals by Order dated October 29, 2003, DR:396a, which provided:

> The defendant's motion for peremptory reversal is DENIED.
>
> The application for leave to appeal is DENIED for failure to persuade the Court of the need for immediate appellate review.

On December 10, 2003, Dow filed with this Court its Emergency Application for Leave to Appeal stating that "the Dow Chemical Company ('Dow'), seeks leave to appeal the Saginaw County Circuit Court's August 18, 2003 Opinion and Order denying Dow's Motion for Summary Disposition of Plaintiffs' medical monitoring claims . . . ." DR:401a. Dow's request for relief from this Court centered on the propriety, as a matter of law, of Plaintiffs' claim for medical monitoring under Michigan law. DR:397a-436a.

After the filing of its application and motions with this Court, Dow initiated extensive discovery in the trial court for the purpose of opposing Plaintiffs' June 23, 2003 motion for class certification. Plaintiffs produced interrogatory answers from 158 Plaintiffs; produced approximately 9,000 pages of documents; and forty-nine Plaintiffs, two expert witnesses, and one third-party witness were deposed by Dow.

On February 27, 2004, nearly eight months after Plaintiffs filed their motion for class certification, Dow filed its brief in opposition to class certification. On March 19, 2004, Plaintiffs' filed their reply brief in support of their motion for class certification. DR:278a-347a. By Order dated March 25, 2004, the Circuit Court scheduled a hearing on class certification to begin on Wednesday, June 9, 2004 at 9:00 a.m. On Tuesday, June 1, 2004, a conference with counsel for the parties and the Circuit Court concerning the final logistics for the class certification hearing was held. The Circuit Court set aside several days to permit the class certification hearing to continue from day to day until completed, affording each side a full and fair opportunity to develop the class certification record.

This Court's June 3, 2004 Order stayed the class certification hearing and all other proceedings.

SUMMARY OF THE ARGUMENT

Plaintiffs seek to certify a class of individuals who, as a result of Dow's negligence, have suffered substantially increased risks of exposure to dioxin, and from this exposure, increased risks of developing grave but latent diseases and adverse health effects. Dioxin is a highly-toxic, man-made pollutant that causes or exacerbates numerous human health disorders, which include, among many others, liver damage, reproductive, endocrine, and neurological impairment, immune system deficiencies, birth defects, and cancer. Unbeknownst to the Plaintiff Class, Dow negligently or willfully released dioxin into the environment with the result that, in the words of the MDEQ,

"elevated dioxin concentrations [are] pervasive" in the Flood Plain of the Tittabawassee River, a discrete geographic area defined by the MDEQ, at levels up to 7,300 ppt, or more than eighty-one times the Michigan clean up standard of 90 ppt. DR:257a-258a. The proposed Plaintiff Class, past and present residents of the Flood Plain, unwittingly have played in, walked on, tilled, and ingested dioxin-laden soil and have breathed dioxin-laden dust. As a result, the proposed Plaintiff Class faces substantially higher probabilities of developing a variety of serious diseases, including but not limited to cancer. These innocent victims of Dow's negligence should receive periodic medical testing so that early detection and treatment can minimize the impact of any resulting illness.

It is the indisputable public policy of Michigan to promote the public health, and to make those parties responsible for environmental contamination pay for remedial action. Monitoring, in the context of environmental contamination, is not a novel legal concept under established Michigan law. Michigan requires employers to medically monitor employees exposed to hazardous substances. Michigan requires monitoring of soil, water, and wildlife contaminated by hazardous substances. But Dow contends that this Court should not permit monitoring of the Michigan citizens who are now living in dioxin contamination caused by Dow.

Although Dow constantly mischaracterizes Plaintiffs' medical monitoring claim as a claim for "damages," in fact no individual Plaintiff would receive money for medical monitoring. Plaintiffs' equitable claim for medical monitoring seeks a Court-supervised program to be used exclusively for medical examinations and procedures to diagnose latent diseases and adverse health effects associated with dioxin, so that the diseases and adverse health effects could be treated at the earliest stages. This treatment would increase Plaintiffs' chances for reducing the effects of dioxin-related diseases, as well as lowering the human, social, and economic costs of undetected and untreated health effects.

The concerns of Dow and its *amici curiae* are ameliorated by the objective criteria Plaintiffs propose, which further define and limit the claim of medical monitoring. Accordingly, the medical monitoring relief sought by Plaintiffs does not open the doors of Michigan Courts to frivolous lawsuits, and certainly does not impair the rights of those already suffering from a diagnosed disease caused by Dow's dioxin. Instead, as Courts in many other jurisdictions already have recognized, medical monitoring promotes the overall public health, provides a deterrent to those who would otherwise contaminate local communities with dangerous toxic substances, conserves medical resources, and is fundamentally fair in that it requires the wrongdoer, rather than the victims, the State, or the tax payers, to bear the costs of toxic exposures. *See, e.g., Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 824 (Cal. 1993); *Ayers v. Township of Jackson,* 525 A.2d 287, 311-312 (N.J. 1987); *Redland Soccer Club, Inc. v. Department of the Army,* 696 A.2d. 137, 145 (Penn. 1997); *Burns v. Jaquays Mining Corp.,* 752 P.2d 28, 33-34 (Ariz. Ct. App. 1987); *Petito v. A.H. Robins Co., Inc.*, 750 So.2d 103, 105-06 (Fla. Ct. App. 1999); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 976-77 (Utah 1993); *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 849-50 (3d Cir. 1990); *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F. 2d 816, 825-26 (D.C. Cir. 1984).

Nothing in Michigan law, whether common law or statute, precludes this Court from recognizing an equitable claim for medical monitoring. In fact, such a claim is fully consistent with long standing goals of tort law as developed in Michigan common law, and has already been recognized by the United States District Court for the Eastern District of Michigan, certifying a class of Michigan residents for a medical monitoring claim. *Gasperoni v. Metabolife, Intern. Inc.*, 2000 WL 33365948 at *8 (E.D. Mich. 2000) PR:1b-8b. Such a claim is likewise consistent with laws in

Michigan that provide for monitoring in the context of environmental contamination and exposure to hazardous substances. *See, e.g.,* M.C.L.A. § 408.1024; M.C.L.A. § 204.20118.

The justification for recognizing an equitable medical monitoring claim is simple: if Dow, through its release of dioxin, put Plaintiffs in a position of enhanced risk of injury, then Dow should pay for the diagnostic testing necessary to detect latent injuries. Nothing in Michigan law bars a medical monitoring claim. Case law, equity, common sense, and the thoughtful decisions of other courts should persuade this Court that under the limited and appropriate circumstances outlined by Plaintiffs, a claim for medical monitoring is viable and necessary to do justice.

ARGUMENT

I. THE STANDARD OF REVIEW IS DE NOVO.

The Court of Appeals declined to reverse the Circuit Court's denial of Dow's motion for summary disposition under MCR 2.116(C)(8). DR:396a. This Court reviews denials of motions for summary disposition under MCR 2.116(C)(8) under a de novo standard. *Maiden v. Rozwood,* 461 Mich. 109, 118, 597 N.W.2d 817 (1999).

A motion for summary disposition brought under MCR 2.116(C)(8) tests the complaint's legal sufficiency on the basis of the pleadings alone. MCR 2.116(G)(5) The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v. Dep't of Corrections,* 439 Mich. 158, 162, 483 N.W.2d 26 (1992). Dow's motion under MCR 2.116(C)(8) may be granted only where the claims alleged by Plaintiffs are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 163.

II. PLAINTIFFS' PROPOSED CRITERIA FOR A MEDICAL MONITORING CLAIM PREVENT THE PARADE OF HORRORS PREDICTED BY DOW.

This case involves serious and substantial environmental contamination. The people living, or who have lived, in the zone of contamination have been exposed to dioxin, a hazardous toxin and known carcinogen. The contamination, as pleaded in the Complaint, is concentrated in the Flood Plain, a geographic area defined by the MDEQ. Compl. ¶¶ 205-19, DR:271a-273a. Dow is wholly responsible for releasing the dioxin that has contaminated Plaintiffs' community.

A. Plaintiffs' Claim for Medical Monitoring Seeks a Court-Supervised Medical Monitoring Program, Not a Lump Sum Payment to Plaintiffs.

Plaintiffs' claim for medical monitoring seeks a court-supervised medical monitoring program, administered by health professionals, who will determine what medical tests should be performed and with what frequency for those who have suffered a significant increased risk of adverse health effects as a result of exposure to the dioxin released by Dow. Compl. ¶¶ 217-19, DR: 273a. Medical monitoring is the periodic application of a diagnostic medical examination to detect a latent disease or condition. The object of monitoring is to find a disease before symptoms arise that would prompt the patient to seek medical care. Generally the person subject to medical monitoring is asymptomatic for the target diseases, not exhibiting easily ascertainable signs of disease and not complaining of symptoms.

Contrary to the insinuations and statements by Dow and its *amici curiae*, Plaintiffs do not seek a lump sum award of damages as compensation for future medical monitoring costs.[2] They do not seek compensation for physical injury or for the enhanced risk of future physical injury. Instead, they seek to establish a judicially administered medical screening and diagnostic program to

[2] It is inherently obvious that the Chamber of Commerce's *amici curiae* brief is a generic document devoid of any specificity to the issues raised here. For instance, the Chamber devotes several pages to attacking lump sum payments–something Plaintiffs have never sought. *See* Chamber Br. at 10-13.

supervise and fund the medical monitoring regime that a reasonable physician would advise for persons exposed to Dow's dioxin in the way Plaintiffs have been and are being exposed. Dow, the party responsible for the exposures - not the innocent victims, and not the Michigan tax payers - would fund the program.

Plaintiffs propose that specific criteria be adopted and applied to set reasonable and objective thresholds, which will ensure that only those with a valid and significant need for medical monitoring can successfully assert a claim. Moreover, no individual would have a financial incentive to assert a medical monitoring claim. Under Plaintiffs' proposed criteria, no incentive would exist for anyone to file such a claim except to obtain medical diagnoses. The screening criteria proposed by Plaintiffs make a medical monitoring claim far less speculative than many claims currently recognized under Michigan's common law.

B. Plaintiffs' Suggested Criteria Appropriately Limit the Scope of Medical Monitoring Claims.

The Michigan Courts have yet to define the criteria necessary to establish an equitable medical monitoring claim. Although Plaintiffs have not yet had the opportunity to develop the factual outline of their proposed medical monitoring program, Plaintiffs respectfully suggest the following seven criteria that should be met to support a claim for equitable medical monitoring.

(1) Plaintiffs must demonstrate that contaminant levels in the environment pose a high likelihood or reasonable certainty of environmental exposure to a hazardous substance and subsequent adverse health outcomes. This criterion would provide the primary "evidentiary filter" for screening out frivolous claims, and would require review of several factors including a) the probability and extent of the plaintiffs' exposure; b) the relative toxicity of the substance; c) the severity of the adverse health effects for which plaintiffs are at increased risk; and d) the relative

increase in the plaintiffs' risk of developing such diseases and health effects as a result of the exposure.

(2) Plaintiffs must demonstrate that the defendant's negligence or intentional conduct was the proximate cause of the exposure.

(3) Plaintiffs must demonstrate that a well-defined, identifiable target population of concern has a probability of exposure to the hazardous substance at a sufficient level to trigger adverse health effects.

(4) Plaintiffs must show documented scientific research that demonstrates a scientific basis for a reasonable association between an exposure to a hazardous substance and a specific adverse health effect or effects.

(5) The medical monitoring sought by Plaintiffs must be directed at detecting adverse health effects that are consistent with the existing body of knowledge and amenable to prevention or intervention measures.

(6) Plaintiffs must demonstrate that a) the natural history of the targeted disease process or processes are understood sufficiently for screening; b) that early detection through screening has a beneficial impact on the natural history of that disease process; and c) the existence of an accepted screening test that meets the requirements for validity, reliability, estimates of yield, sensitivity, specificity, and acceptable cost.

(7) For the diseases or adverse health effects for which Plaintiffs seek medical monitoring, Plaintiffs must demonstrate that an accepted treatment or intervention exists, and that early detection and treatment or intervention for such disease or adverse health effects could promote an improved outcome for affected individuals.

These criteria proposed by Plaintiffs provide reasonable limitations on claims for medical monitoring and ensure that medical monitoring programs will have a firm scientific and medical basis. Far from encouraging the "flood gates" of litigation to open, these criteria ensure that only serious and meritorious claims for medical monitoring would be considered.

Under these criteria, Plaintiffs would submit a medical monitoring protocol developed by medical and toxic-disease specialists who would operate under the court's supervision and would be paid by Dow through a court-administered fund. No plaintiff would receive a cash payment from the fund. A phased screening process would (1) determine the significance of each person's exposure to dioxin, (2) test exposed persons to determine the amount of dioxin in their bodies, (3) determine which persons have heightened susceptibility to particular dioxin-associated illnesses or diseases, and (4) take medically necessary steps to monitor affected individuals. Under this protocol, a Plaintiff who had little exposure may have limited, if any, follow up, while a pregnant woman or a young child who frequently has played outdoors could receive comprehensive testing and priority follow-up.

A medical monitoring screening of Plaintiffs, as posited above, for dioxin-related ailments is feasible and appropriate. In fact, the MDEQ, in cooperation with the MDCH and the Agency for Toxic Substances and Disease Registry ("ATSDR"), currently is conducting a "pilot exposure study" for dioxin that in many respects is a medical monitoring program in miniature.[3] The first phase of the "pilot exposure study" includes an interview or questionnaire to determine the likelihood of exposure-in-fact for each individual. The individuals who are determined most likely to be at risk from exposure to dioxin will be the first persons tested for the presence of dioxin in their bodies.

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[3] "Pilot Exposure Investigation: Dioxin Exposure in Adults Living in the Tittabawassee River Flood Plain, Saginaw County, Michigan," May 25, 2004, Michigan Department of Community Health, Division of Environmental and Occupational Epidemiology, http://www.michigan.gov/documents/TittabawasseeRiverPilotEIProtocol_81486_7.pdf. PR:29b-97b.

This "pilot exposure study," however, does not provide the relief that Plaintiffs seek and should receive.

Medical monitoring for dioxin-related illnesses is beyond the expertise of family doctors, and is not likely to be covered by insurance. It only makes sense that Dow, not the individuals who are at risk of serious diseases and adverse health effects, should bear the cost of medical monitoring for those whom Dow has put at risk.

III. THE COMMON LAW OF MICHIGAN CONTINUES TO EVOLVE; THIS COURT CAN AND SHOULD RECOGNIZE AN EQUITABLE CLAIM FOR MEDICAL MONITORING AS PART OF MICHIGAN'S COMMON LAW.

Dow repeats throughout its brief the mantra that there is no Michigan precedent supporting a claim for equitable medical monitoring. Dow Br. at 23. Dow urges on the Court the reactionary position that the common law of Michigan should be frozen and suggests that this Court is not capable of developing the law without legislative intervention. This is untrue. The common law is ever changing to keep pace with society's progress and challenges. New causes of action are constantly created. *See, e.g., Berger v. Weber*, 303 N.W.2d 424, 411 Mich. 1 (1981) (creating new cause of action for a child's loss of parental society and companionship). Old decisions are overturned. *See, e.g., County of Wayne v. Hathcock*, __ Mich. __, 684 N.W.2d 765, 2004 WL 1724875 (Mich. July 30, 2004) (overruling *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981)). New remedies are recognized. *Placek v. City of Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (1979) (adopting doctrine of comparative negligence).

In *Adkins v. Thomas Solvent Co.,* 440 Mich. 293, 317, 487 N.W.2d 715 (1992), a case relied on by Dow, this Court adopted Plaintiffs' position here, stating that when "appropriate we have not hesitated to examine common-law doctrines in view of changes in society's mores, institutions, and problems, and to alter those doctrines where necessary. [Citations omitted.] In a given case, the

dangers posed by environmental contamination may not be adequately addressed by statutorily created private actions or by traditional rules adopted prior to the existence of these problems."

This Court has held that "[l]ack of precedent cannot absolve a common-law court from responsibility for adjudicating each claim that comes before it on its own merits .... Here we must consider [a] claim in light of conditions pertinent to modern society and weigh the reasons urged for denying the cause of action." *Berger*, 411 Mich. at 12.

This Court eloquently explained its role and duty to develop the common law:

> Thus again we reach the conflict that divides us, for the law, as Dean Pound put it, must be stable, and yet it cannot stand still. Were we to rule upon precedent alone, were stability the only reason for our being, we would have no trouble with this case. We would simply tell the woman to be gone, and to take her shattered husband with her, that we need no longer be affronted by a sight so repulsive. In so doing we would have vast support from the dusty books. But dust the decision would remain in our mouths through the years ahead, a reproach to law and conscience alike. Our oath is to do justice, not to perpetuate error.

Montgomery v. Stephan, 359 Mich. 33, 38-39, 101 N.W. 2d 227 (1960).

> The question for decision is not whether such a right existed then but whether it exists today. The difference between looking backward and looking forward. Is the face of justice, as someone put it, like the face on a coin, always to look backwards?

Id. at 45. The logic of these cases is equally applicable and compelling today.

Dow can point to no Michigan legislative act preventing a court-supervised program for medical monitoring. Any implied rule against such recovery, according to Dow, was created by the courts of this state and not by the legislature. It is, therefore, within the Court's authority and responsibility to make changes in the common law. If the common-law rule no longer fits the social realities of the present day, the Court should change the law.

> In fact we have seen, within our own lifetimes, the extension of the law's protection to areas once thought too obscure for recognition, to rights once thought too vague, too ephemeral, too intangible to be capable of legal measurement. Without legislative intervention, as a part, indeed, of the normal and traditional growth of the common law a right of privacy has been accorded protection. We need not elaborate.

Id. at 47.

Nothing in Michigan law, either common law or statutory, prevents Michigan courts from recognizing an equitable claim for medical monitoring. On the contrary, the United States District Court for the Eastern District of Michigan, in a decision completely ignored by Dow, concluded that Michigan would recognize a state law claim for medical monitoring and certified a class for such a claim. In *Gasperoni v. Metabolife, Intern. Inc.*, 2000 WL 33365948 at *8 (E.D. Mich. 2000), the Eastern District considered, inter alia, a motion for class certification of a claim for medical monitoring brought by plaintiffs, individuals throughout the State of Michigan who had ingested Metabolife 356, a diet product containing ephedrine, an ingredient that has been linked to serious adverse health effects. Plaintiffs there were not seeking damages for personal injury; instead they sought "medical monitoring to allow consumers to find out whether they have physical damage attributable to the product." *Id.* at *7. The Eastern District, applying Michigan law, granted plaintiffs' motion for class certification of this claim for medical monitoring. *Id.*

IV. MEDICAL MONITORING IS CONSISTENT WITH THE MICHIGAN LEGISLATURE'S PREVIOUS ENACTMENTS.

The Michigan legislature has flatly stated that environmental contamination threatens the public health and has mandated appropriate responses to protect the public health. The legislature also already requires medical monitoring of employees exposed to hazardous substances by employers and requires the employer to cover the costs. Finally, the legislature requires monitoring of property and water to quantify and control the spread of environmental contamination. If the Michigan legislature requires medical monitoring of exposed employees and environmentally contaminated property, surely this Court can recognize a claim to monitor individuals exposed by environmental contamination.

A. Monitoring is Already Accepted and Required for Exposed Employees and for Contaminated Property, Soil, and Ground Water.

The Michigan Constitution declares that the "public health . . . of the people of the state is a matter of "primary public concern";" Art 4, § 51. The Michigan Constitution further declares that the "conservation and development of natural resources of the state are hereby declared to be of paramount public concern in the interest of the health . . . of the people." Art 4, § 52. As a consequence, the legislature, acting to protect the public health, declared that "there exists in this state certain facilities containing hazardous substances that pose a danger to the public health" and that "there is a need to provide a method of eliminating the danger." M.C.L.A. § 324.20102(a), (b).

Michigan has recognized that medical monitoring is the appropriate response when discrete groups of people are threatened by exposure to hazardous substances in their employment. M.C.L.A. § 408.1024 requires employers to conduct medical monitoring of workers who may be exposed to hazardous substances. Subsection (7) provides that employers must "monitor or measure employee exposure "[to hazardous substances], . . . and must "conduct the monitoring in a manner that is necessary for the protection of the employees' health." Subsection (8) of the law requires that medical examinations or tests be made available, to determine if employees have been adversely affected by exposure to health hazards.

Legislative acts also provide for the monitoring of contaminated property to guide responsive measures and to control the spread of contamination. *See, e.g.,* M.C.L.A. § 324-20118(10)(monitoring of aquifers). Thus, Michigan law already recognizes and accepts monitoring of both people and property as an appropriate response to environmental contamination. If the MDEQ can order monitoring of property, soil, water, fish, and wildlife for dioxin contamination, this Court should permit the medical monitoring of human beings for the adverse effects of that same dioxin contamination.

B. Established Policy in Michigan Requires that the Party Responsible for the Exposure or Contamination Pay for All Associated Costs.

It is also the public policy of Michigan to make the party responsible for environmental contamination pay the related costs. For example, the NREPA provides that the cost and liability for responding to environmental contamination should be borne by those responsible for the contamination. M.C.L.A. § 324.20102(e) and (f). The Michigan Occupational Safety and Health Act requires employers to conduct medical monitoring and to pay the costs. M.C.L.A. § 408.1024(8). It is well recognized in Michigan that the burden of paying for the effects of environmental contamination should not fall on the people exposed to the contamination, the local government, or the tax-payers of Michigan. Instead, Michigan law directs that those responsible for environmental contamination pay for its effects and consequences. Plaintiffs' claim for equitable medical monitoring in this case is consistent with that policy.

C. Medical Monitoring for Individuals Exposed to Environmental Contamination Is a Logical Extension of the Common Law.

It would be illogical for the Court to prohibit medical monitoring of people, but to uphold the monitoring of property. The adoption of medical monitoring for those individuals unlucky enough to be exposed to hazardous environmental contamination would not substantially expand Michigan tort law. It would merely add an additional tool in the effort already sanctioned by the legislature. The remedies provided by statute and the current common law are not an exclusive list and the Court is free to create other causes of action and remedies as necessary.

The Michigan legislature itself has recognized the need for expansion of the common law in the environmental context. For instance, the NREPA provides that there is a need for additional "judicial remedies to supplement existing statutory and common law remedies." M.C.L.A. § 324.20102(d). Interpreting this section, this Court, in *Nemeth v. Abonmarche Development, Inc.*, 457 Mich. 16, 24-25, 576 N.W.2d 641 (1998), and *Ray v. Mason County Drain Com'r,* 393 Mich.

294, 306-08, 224 N.W.2d 883 (1975), spoke in favor of creating and encouraging a common law of environmental quality, much as courts have developed a right to privacy, nuisance, or torts in general. *Ray,* 393 Mich. at 307 n.10.[4] The Court is free to, and indeed must, fashion standards in the context of actual problems as they arise in individual cases.

V. GENERAL PUBLIC POLICY CONSIDERATIONS FAVOR RECOGNIZING A CLAIM FOR MEDICAL MONITORING.

As with all new causes of action, medical monitoring raises public policy[5] concerns. On balance, however, these considerations favor recognizing medical monitoring. Plaintiffs recommend to the Court's review the public policy analysis of the leading cases of California, New Jersey, Pennsylvania, Arizona, Florida, and Utah, as well as leading federal court cases, as examples of well reasoned public policy examinations.[6] The public policy analysis of the Michigan Court of Appeals is virtually identical. *Meyerhoff v. Turner Construction Co.,* 202 Mich. App. 499, 504-05, 509 N.W.2d 847 (1993), *vacated by* 456 Mich. 933, 575 N.W.2d 550 (1998).

There are four distinct and widely recognized policy goals that support adopting a claim for medical monitoring. These are also fundamental goals of Michigan tort law.

A. The Overall Public Health Benefits by Allowing Medical Monitoring.

There is an important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease. This is particularly true in light of the value of early diagnosis and treatment for many cancer patients. The

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[4] The *Ray* Court went on to note that judicial development of a common law of environmental quality can only take place if Circuit Court judges take care to set out with specificity the factual findings upon which they base their ultimate conclusions. *Id.* at 307-08.

[5] As the Court observed in *Skutt v. Grand Rapids,* 275 Mich. 258, 264-265, 266 N.W. 344 (1936) public policy is the community common sense and common conscience, extended and applied throughout the State to matters including public health. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation.

[6] See *Potter,* 863 P.2d at 824; *Ayers,* 525 A.2d at 311-12; *Redland,* 696 A.2d. at 145; *Burns,* 752 P.2d at 33-34; *Petito,* 750 So.2d at 105-06; *Hansen,* 858 P.2d at 976-77; *In re Paoli,* 916 F.2d at 849-50; *Friends,* 746 F. 2d at 826.

early detection of cancer usually improves the prospects for cure, treatment, prolongation of life, and minimization of pain and disability. Medical monitoring not only permits early detection, but also encourages plaintiffs to detect and then treat their injuries as soon as possible.

The general public health benefits from providing preventive care to individuals who would otherwise go without. Early diagnosis mitigates potentially serious future health effects of diseases by detecting them in early stages. Because testing for the presence of hazardous toxins and for the resulting latent diseases may be prohibitively expensive or difficult to obtain, without a medical monitoring claim many victims may go without the necessary testing. Withholding relief is costly, for lives will be lost and treatment will be prolonged and made less effective when grave disease is diagnosed too late. With medical monitoring, the human, social, and economic costs of serious diseases and adverse health effects may be reduced significantly.

B. Medical Monitoring Provides a Strong Deterrent to Those Who Would Otherwise Release Dangerous Toxic Substances Into the Local Community.

There is a deterrence value in recognizing medical monitoring claims. This Court recognizes deterrence of harmful conduct as a vital policy interest. *Weymers v. Khera,* 454 Mich. 639, 563 N.W.2d 647, 652 (1997). Requiring a negligent defendant to pay for the costs of medical monitoring made necessary by the defendant's negligence deters irresponsible discharge of toxic chemicals, *see* M.C.L.A. § 324.20102(e) and (f). Permitting a tortfeasor that discharges toxic substances into the community to shift the entire cost and risk of latent disease detection to the community provides little to no deterrent.

C. Medical Monitoring Conserves Scarce Medical Resources.

Paying now for targeted monitoring and appropriate follow-on early treatment creates substantial savings when compared with the potentially enormous deferred cost of substantial illness and injury. The availability of a remedy before the consequences of a plaintiff's exposure are

manifest prevents or mitigates serious future illnesses. The overall costs to both defendants like Dow and to society at large, which must bear the burden of medical costs and the lost contribution of those who become ill, are reduced.

Medical monitoring does not require courts to speculate about the probability of future injury and risk misallocating resources. It merely requires courts to ascertain the probability that the far less costly remedy of medical supervision is appropriate. Dow's counter-argument, that wasteful courts would direct medical resources to screening plaintiffs rather than to treating the already ill or injured, derogates the judiciary.

D. Fundamental Fairness Requires the Wrongdoer, Not the Victim, To Bear the Reasonable Costs of the Toxic Exposures.

Finally, societal notions of fairness and elemental justice are better served by allowing medical monitoring. It would be inequitable for an individual wrongly exposed to dangerous toxins, to have to pay the expense of medical monitoring when such intervention is clearly reasonable and necessary. In other words, the guilty party should pay. *See* M.C.L.A. § 324.20102(e) and (f).

Numerous courts have found that this same interest supports medical monitoring. It is inequitable to place the economic burden of such care on the negligently exposed plaintiff rather than on the negligent defendant. Allowing recovery for such expenses avoids the potential injustice of forcing an economically disadvantaged person to pay for expensive diagnostic examinations necessitated by another's negligence. Indeed, in many cases a person will not be able to afford such tests, and refusing to allow medical monitoring would, in effect, deny him or her access to potentially life-saving treatment.

E. The Public Policy Concerns Raised By Dow Are Not Persuasive, and Largely Can Be Avoided through the Application of Plaintiff's Proposed Criteria.

In its brief, Dow raises a number of alleged potential policy concerns and attempts to set up a strawman of the worst abuses to which a medical monitoring program theoretically could lead. The

concerns raised by Dow are exaggerated and are minimized, if not eliminated, by the threshold criteria proposed by Plaintiffs.

In addressing public policy concerns, Dow relies heavily on *Metro-North Commuter Railroad Co. v. Buckley,* 521 U.S. 424 (1997). As with almost every case cited by Dow, the plaintiffs in Buckley sought a lump sum damage award. Indeed, the issue arguably before the Court was whether the Federal Employers' Liability Act ("FELA") permits a plaintiff without symptoms to collect "an amount of money sufficient to compensate him for future medical monitoring expense." *Id.* at 439. The Court's holding – "we do not find sufficient support in the common law for the unqualified rule **of lump-sum damages recovery** that is, at least arguably, before us here" – is self explanatory. *Id.* at 444 (emphasis added).

Two other points minimize *Buckley's* applicability here. First, in Buckley the Supreme Court was interpreting a federal statute. This statutory analysis has nothing to say about any individual state's common law. *See Petito,* 750 So.2d at 105 (inapplicability of decision interpreting federal statute to state common law). Second, the primary issue in *Buckley* was not medical monitoring but "whether a railroad worker . . . without symptoms of any diseases can recover under [FELA] for negligently inflicted emotional distress." 521 U.S. at 426-27.

Buckley's analysis, therefore, has little to do with the issue before this Court. In dicta, the Court did review public policy considerations both favoring and opposing medical monitoring damage awards. *Id.* at 440-44. Indeed, after comparing the various policy considerations, the Court concluded that the "reality is that competing interests are at stake--and those interests sometimes can be reconciled in ways other than simply through the creation of a full-blown, traditional, tort law cause of action." This is precisely what Plaintiffs seek here. They do not seek to create a "full-

blown, traditional, tort law cause of action" with its attendant lump sum damage award. Instead Plaintiffs seek an equitable court-monitored program.

1. Medical Monitoring Claims Are Demonstrably Not Speculative and Uncertain.

Far from being speculative and uncertain, as Dow argues (Dow Br. at 29-31), a plaintiff must meet a specific standard in order to bring and then recover on a medical monitoring claim. See *Ayers,* 525 A.2d at 313; *Potter,* 863 P.2d at 823 (medical monitoring "does not require courts to speculate about the probability of future injury," instead it requires courts to determine the probability that medical supervision is appropriate) and 825 ("medical monitoring costs are not speculative because they are based on specific dollar costs of reasonable and necessary examinations"); *Hansen*, 858 P.2d at 977. Plaintiff bears the burden of proof to make the requisite showing. *Patton v. General Signal Corp.,* 984 F. Supp. 666, 673 (W.D.N.Y. 1997). Plaintiffs therefore do not recover merely because they had a passing exposure to some noxious substance. Medical monitoring would not breed unreliable and trivial claims. Plaintiffs' proposed criteria should assuage any doubts with respect to these issues.

The standard is not uncertain or speculative. The standard is whether medical monitoring is, to a reasonable degree of probability, necessary in order to properly diagnose warning signs of disease. In order to prevail, a claimant must provide sufficient proof to satisfy the criteria articulated above. These criteria are far less speculative and uncertain than other causes of action recognized in Michigan. For instance, Michigan recognizes a cause of action for enhanced risk of future injury. *See Prince v. Lott*, 369 Mich. 606, 120 N.W.2d 780 (1963). In comparing such a cause of action to one for medical monitoring, the U. S. Third Circuit Court of Appeals in *In re Paoli* dismissed the argument asserted by Dow, and found medical monitoring claims to be less speculative. The Court observed that enhanced risk claims are "inherently speculative because courts are forced to anticipate

the probability of future injury. [But medical monitoring claims are] much less speculative because the issue . . . is the less conjectural question of whether the plaintiff needs medical surveillance." 916 F.2d at 849-50 (emphasis added).

Competent expert testimony can assist in determining whether the threshold criteria have been met. Evaluating exposure, risk, and the need for monitoring are all topics for expert testimony. Dow asserts that plaintiffs would have no difficulty in locating expert witnesses willing to espouse any theory of causation short of the fantastic. Dow Br. at 25. This, however, is not a legitimate basis to oppose medical monitoring. First, applying Dow's theory to itself, Dow likewise would have no difficulty locating expert witnesses to testify and deny any theory of causation, no matter how firmly established and accepted. Second, since Plaintiffs assert an equitable claim, the matter would be tried to the Court and the Court is fully capable of weighing conflicting expert testimony and ignoring implausible theories.

Almost every criteria for a medical monitoring claim is premised on objectively verifiable information or upon the current state of scientific or medical knowledge. There is little or no room for subjective assessments and testimony. Furthermore, contrary to the protestations of Dow and its *amici curiae*, medical monitoring costs are not speculative because they are based upon the specific dollar costs of reasonable and necessary periodic examinations and diagnostic procedures.

2. There Has Not Been and Will Not be A "Flood of Litigation".

Contrary to Dow's doomsaying, adoption of medical monitoring has not paved the way for "tens of millions" of claims. Dow Br. at 31. Given the evidentiary burden, objective criteria, and lack of individual monetary awards, plaintiffs have no incentive to bring frivolous suits. *See Potter*, 863 P.2d at 825 (adopting medical monitoring "will not . . . open the floodgates of litigation;" plaintiffs face substantial evidentiary burdens). Only plaintiffs who successfully prove each element

will be entitled to a limited benefit – monitoring by medical experts for the condition for which they are at an increased risk.

Furthermore there is no evidence that a "flood of litigation" has developed in those jurisdictions where medical monitoring is already recognized and allowed. Given the large number of states that have adopted medical monitoring over the last 20 years, surely Dow and its *amici curiae* could have presented statistical evidence of a substantial increase in the number of such lawsuits. They have not because there has been no substantial increase. Medical monitoring claims such as those sought by Plaintiffs are too restrictive and afford too little in the form of monetary gain to encourage frivolous lawsuits.

3. The Court is Competent to Determine Appropriate and Reasonable Monitoring Regimes.

Inevitably, at times doctors will agree that medical attention is needed, yet disagree on what monitoring or treatment course is best. But uncertainty as to which tests are best or when they should be administered is not cause to deny a claim for relief. Triers of fact in tort cases routinely face questions lacking clear answers, such as issues of causation and the correct amount of damages for injuries not readily reduced to a set amount of money. It is the nature of our judicial process that Courts must wrestle with highly complex issues and make decisions based on conflicting expert testimony.

VI. PLAINTIFFS HAVE SUFFERED A LEGALLY COGNIZABLE INJURY, FOR WHICH A COURT-CONTROLLED MEDICAL MONITORING PROGRAM IS THE APPROPRIATE REMEDY.

Dow makes two arguments to contest Plaintiffs' claim. First, it argues that Plaintiffs have not suffered a "legally cognizable" injury, and, therefore, have no grounds to seek a remedy. Second, it argues that even if an injury is cognizable, Plaintiffs' requested remedy is not permitted because Plaintiffs have no current physical injury. Neither of these arguments is persuasive.

A. Exposure to a Toxic Substance Resulting in a Substantially Increased Risk of Suffering Serious Future Illness is a Cognizable Injury or Harm.

Dow starts with the questionable assertion that Plaintiffs have suffered no "legally cognizable" injury. Dow Br. at 22. Obviously the 'injury" sustained by Plaintiffs is the invasion of their interest in being free from the economic burden of extraordinary medical surveillance. But for Dow's negligent release of dioxin into the community, Plaintiffs would not have the need for medical screening procedures beyond those of an average person not exposed to Dow's dioxin.

Recovery for medical monitoring is a legal concept necessitated by changes in society and advances in medical science. It does not, however, constitute a break with the common law tradition or represent an expedition into uncharted waters. Traditionally, most, but not all, recovery required some sort of physical harm. The "injury" in a medical monitoring claim is not premised on a current physical harm, but on the cost of the specialized medical examinations that are necessary to detect the onset of physical injury resulting from the toxic exposure. The Third U.S. Court of Appeals explained:

> Medical monitoring is one of a growing number of non-traditional torts that has developed in the common law to compensate plaintiffs who have been exposed to various toxic substances. Often, the diseases or injuries caused by this exposure are latent. This latency leads to problems when the claims are analyzed under traditional common law tort doctrine because, traditionally, injury needed to be manifest before it could be compensable. Thus, plaintiffs have encountered barriers to recovery which arise from the failure of toxic torts to conform with the common law conception of an injury.

In re Paoli, 916 F.2d at 849-50; *see also Potter,* 863 P. 2d at 822; *Hansen*, 858 P. 2d at 977. The Fourth U.S. Circuit Court of Appeals found it "difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury." *Friends*, 746 F. 2d at 826. "Defining injury in this way is not novel." *In Re Paoli*, 916 F. 2d at 851.

B. Dow Mistakenly Focuses Only On Physical Harm or Injury.

The main focus of Dow's argument is a claim for medical monitoring in Michigan can only accrue if the plaintiff has a current or manifest physical injury, or at least one reasonably certain to occur. To support this untenable position Dow not only assumes that only physical injury causes harm, but also ignores Michigan common law permitting recovery without the need for a current physical injury. Dow mischaracterizes the state of Michigan law when it contends that "a claim seeking to recover solely for potential future injuries is not actionable" and that a "manifest physical injury for recovery in tort has been the hallmark of Michigan common law for over one hundred years." Dow Br. at 16.

These statements misstate Michigan law. In fact, Dow simultaneously claims that a physical injury is required for recovery and concedes that it is not required. Dow blurs the distinction between using physical injury as a compensable harm and as an "evidentiary filter." Dow Br. at 24. Dow concedes that in some causes of action, such as infliction of emotional distress, Michigan common law allows recovery for a non-physical injury or harm. In other causes of action, a reasonable certainty of future physical injury permits recovery. In these cases, the physical injury is not the compensable harm.

Plaintiffs do not seek an award of damages for emotional distress in this lawsuit. Nevertheless, Michigan cases awarding damages for emotional distress have some relevance here, but not for the reasons Dow supposes. Damages in these cases are for emotional distress, not for physical injury. The requirement of a demonstrated physical injury or manifestation serves only as an objective threshold for determining which claims are actionable. In a medical monitoring claim, the ability to test for or otherwise demonstrate an adequate exposure to a toxic substance serves the same end.

Michigan courts examining cases of emotional distress have used physical injury as an evidentiary filter. *See Nelson v. Crawford*, 122 Mich. 466, 81 N.W. 335 (1899); *Manie v. Matson Oldsmobile-Cadillac Co.,* 378 Mich. 650, 148 N.W.2d 779 (1967) (Court's reason for requiring a physical impact or injury as a prerequisite to recover for emotional distress damages was to have objective criteria of emotional distress); *Daley v. LaCroix*, 384 Mich. 4, 179 N.W.2d 390 (1970); *Stites v. Sundstrand Heat Transfer*, 660 F. Supp 1516, 1526-27 (W.D. Mich. 1987) (in Michigan the "definite and objective standard" for emotional distress recovery is lenient, and mere nervousness, not a physical injury, is a sufficient manifestation for recovery). The emotional distress cases from other jurisdictions cited by Dow are no different. They all require some type of physical manifestation before the claim for emotional distress can be brought. The harm for which compensation is sought, however, is the emotional distress, not the physical injury. Dow Br. at 38.[7] These cases have no direct relevance to the medical monitoring issue. Indeed, in *Mergenthaler,* the only one of the three cases where plaintiffs brought a medical monitoring claim, the court dismissed that claim because of plaintiffs' lack of evidence of any exposure, not for lack of a current physical injury.

Dow also directs the Court to enhanced risk cases. These cases allowed plaintiffs to recover an award of damages to compensate for future or enhanced consequences, such as future medical treatment or future pain and suffering. But recovery in these cases requires a showing that the future injury will result with reasonable certainty from a current physical injury. Dow Br. at 16.[8]

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[7] *Citing Gutierrez v. Massachusetts Bay Trans. Auth.*, 772 N.E.2d 552 (Mass. 2002), *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647 (Del. 1984), *Rabb v. Orkin Exterminating Co.* 677 F. Supp. 424 (D. S.C. 1987).

[8] *Citing King v. Neller*, 228 Mich. 15, 21, 199 N.W. 674 (1924)(pain and suffering); *Prince v. Lott*, 369 Mich. 606, 609, 120 N.W.2d 780, 781 (1963)(pain and suffering); *Stites v. Sundstrand Heat Transfer, Inc.,* 660 F. Supp 1516, 1523-25 (W.D. Mich. 1987)(future onset of cancer from toxic exposure).

None of these cases, of course, apply to the medical monitoring Plaintiffs seek here. The claim for medical monitoring is separate and distinct from recovery for the enhanced risk of contracting a serious illness due to exposure. The appropriate inquiry for a medical monitoring claim is not whether it is reasonably probable that plaintiffs will suffer harm in the future, but whether medical monitoring is, to a reasonable degree of medical certainty, currently necessary to properly diagnose warning signs of disease. *Paoli*, 916 F. 2d at 851.

The courts that have analyzed this forced comparison reject it out of hand; "The injury in an enhanced risk claim is the anticipated harm itself. The injury in a medical monitoring claim is the cost of the medical care that will, one hopes, detect that injury." *In re Paoli*, 916 F.2d at 850-51.[9]

Dow makes a similar argument from cases determining whether the statute of limitations for a personal injury claim, that is, one seeking a lump sum award for a manifest physical injury, accrues at the time of exposure or when an injury actually manifests. Most of these cases, unsurprisingly, arise in the context of asbestos due to the long latency period between exposure and the manifestation of asbestosis, lung cancer, or mesothelioma. Dow's lead case is *Larson v. Johns-Manville Sales Corp.*, 427 Mich. 301, 399 N.W.2d 1 (1986), in which this Court determined that a personal injury action accrued and the limitations period began when an actual illness or injury was detected or when "the plaintiff [could] demonstrate with reasonable certainty that the future consequences will occur." *Id.* at 317. Dow cites other cases for the same result. Dow Br. at 39.[10]

These cases are irrelevant here. All the cases cited by Dow seek a lump sum damage award. The issue before the court in these cases was the point in time when a claim seeking a lump sum award accrued for statute of limitations purposes. Rather than a lump sum damage award for some

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[9] *See also Hansen*, 858 P.2d at 976 n.6 (claims are separate and conceptually distinct); *Ayers*, 525 A.2d at 297-313(same); *Redland,* 696 A.2d 137(same); *Petito*, 750 So.2d at 105-06 (same).

[10] *Citing Bernier v. Raymark Indus., Inc.*, 516 A.2d 534 (Me. 1986); *Allied Signal, Inc. v. Ott,* 785 N.E. 2d 1068 (Ind. 2003); *Locke v. Johns-Manville Corp.*, 275 S.E. 2d 900 (Va. 1981).

species of physical injury, Plaintiffs are seeking to detect and minimize future damages through medical monitoring. In a medical monitoring case, probable exposure–not an injury years or decades later–is the key.

The Courts that have examined a Court-supervised medical monitoring program have not required a physical injury as a prerequisite for that claim. Indeed, the jurisdictions from which Dow cites often prove Plaintiffs' point. For example, Dow cites a Third U.S. Circuit Court of Appeals opinion to support the general proposition that injury is a necessary element of tort law. Dow Br. at 38.[11] Dow disregards one of the strongest and most complete opinions issued by that same court supporting a medical monitoring cause of action, including an explanation of why a physical injury is not necessary for recovery. *In re Paoli*, 916 F. 2d 829. Similarly, Dow cites to a California appeals court opinion to support the need for physical injury. Dow Br. at 38-39.[12] Dow, however, fails to mention that the California Supreme Court adopted medical monitoring without requiring a current physical injury. *Potter*, 863 P.2d 795.

Dow urges this Court to hold that unless Plaintiffs suffer from an objectively quantifiable current physical injury, Dow bears no responsibility to Plaintiffs for their increased costs of medical surveillance—this notwithstanding the fact that Dow has polluted the backyards, homes and fields of the Flood Plain with a dangerous and deadly toxin. This Court should reject Dow's irresponsible position and, along with other Courts considering an equitable Court-supervised medical monitoring program, allow Plaintiffs to prove their equitable claim for medical monitoring.

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[11] *Citing Schweitzer v. Consol Rail Corp.*, 758 F. 2d 936 (3d Cir. 1985).

[12] *Citing Associated Idem. Corp. of Indus. v. Accident Comm'n*, 12 P.2d 1075 (Calif. App. 1932).

C. Cases Involving Stigma Damages to Real Property Values are Irrelevant to Medical Monitoring Claims.

Dow next turns to cases involving stigma damages to real property, Dow Br. at 19-20, the relevance of which is highly questionable at best. Dow cites *Adkins*, 440 Mich. 293, 487 N.W.2d 715. In *Adkins*, the trial court dismissed some plaintiffs because their own experts had conceded that contaminated groundwater never could reach their property, which was separated from the contaminated area by a groundwater divide. The Supreme Court upheld the dismissal as to those plaintiffs but ordered the case to go forward as to the remaining property owners.

In contrast to the facts of *Adkins*, the State of Michigan has already concluded that the entire Flood Plain is contaminated with dioxin and that children cannot safely play in their backyards. Thus, the *Adkins* case bears no relevance to Plaintiffs' claims here.

D. Dow's Reliance on Medical and Legal Malpractice Cases Also Is Misplaced.

The other cases relied upon by Dow are even less relevant to the issue here. Dow Br. at 20. In *Wickens v. Oakwood Healthcare Sys.*, 465 Mich. 53, 631 N.W.2d 686 (2001) and *Weymers v. Khera*, 454 Mich. 639, 563 N.W.2d 647 (1997), the issue was not the need for a plaintiff to have an actual current injury; it was the correct interpretation of M.C.L.A. § 600.2912a – a medical malpractice statute. These cases also differ from Plaintiff's medical monitoring claim here because in *Wickens* and *Wymers* the plaintiffs sought a lump sum award of compensatory damages. Last, in *Colbert v. Conybeare Law Office,* 239 Mich. App. 608, 619-20, 609 N.W.2d 208 (2000), a legal malpractice claim, the Court reiterated that to recover an award of damages, the plaintiff must offer evidence of the fact and extent of an actual injury. Here, Plaintiffs do not seek damages; instead they seek an equitable remedy.

E. As a Remedy for Their Injury, Plaintiffs Seek a Court-Supervised Medical Monitoring Program, Not as Dow Would Have It, A Lump Sum Payment.

Two factors distinguish Plaintiffs' medical monitoring claim from the counter-arguments and examples asserted by Dow. First, Plaintiffs' claims are only for medical monitoring; no Plaintiff intermixes a claim for current personal injury. Second, Plaintiffs do not seek an award of damages or a mechanism to compensate individual Plaintiffs for illness or injury detected at some future time. Instead, Plaintiffs seek a court-supervised monitoring program that would administer and pay for the costs of necessary medical surveillance, as those costs are actually accrued.

A claim for a medical monitoring trust fund is significantly different from a claim for a lump sum award of damages. A trust fund covers only the necessary monitoring costs actually incurred. In contrast, a lump sum award of damages is a monetary award that a claimant can spend as he or she sees fit. Those courts that have examined the issue advocate the trust fund approach.[13]

Dow and its *amice curiae* consistently misrepresent Plaintiffs' claim by implying that medical monitoring is merely another form for a lump sum damage award. Dow Br. at 26. To support its arguments, Dow cites and relies almost exclusively on cases in which plaintiffs sought some form of a lump sum award, *see, e.g.,* Dow Br. at 28-34,[14] all the while ignoring the facts of these cases.

Moreover, Dow refuses to acknowledge the inherent and substantial difference between a lump sum damage award and an equitable medical monitoring program. The significant difference between the two remedies arises not only in their form, but in the source of the Court's power to impose them. A court, using its inherent legal powers, can enter a judgment imposing a lump sum damage award. In contrast, it is a court's inherent equitable power that allows it to create, supervise, and control a medical monitoring program.

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[13] *See, e.g., Redland*, 696 A.2d at 142 n.6; *Hansen,* 858 P.2d 970; *Ayers,* 525 A.2d 287; *Burns,* 752 P.2d 28.

[14] R*elying on Metro-North Commuter Railroad v. Buckley*, 521 U.S. 424 (1997).

VII. THE MEDICAL MONITORING SOUGHT BY PLAINTIFFS IS A FORM OF EQUITABLE RELIEF, AND IS WITHIN THE COURT'S EQUITABLE POWERS.

A medical monitoring program is equitable in nature, is future-focused, and is intended to prevent or mitigate the possible onset of disease resulting from toxic exposure. It seeks to avoid harm rather than compensate for harm. This is analogous to the purpose of the most common form of equitable relief - the injunction,[15] which is issued when its denial will result in irreparable harm, not after the harm has already occurred. *See, e.g., Michigan State Employees Ass'n v. Dep't of Mental Health,* 421 Mich. 152, 157-158, 365 N.W.2d 93 (1984).

The key to the equitable nature of the medical monitoring remedy is the circuit court's ongoing supervision within its equity jurisdiction. Essentially, Plaintiffs seek to have Dow pay into a court-supervised fund that would provide such medical monitoring of Plaintiffs as was determined to be necessary and appropriate. The precise details of the fund's operation are immaterial to whether medical monitoring relief is equitable. Because the nature of medical monitoring rests on the prevention of greater future harm, a specific remedy, such as a court-supervised fund, is appropriately characterized as equitable relief. Several other considerations demonstrate that Plaintiffs seek an equitable remedy,[16] and fully distinguish Plaintiffs' claim from a medical monitoring action seeking a lump sum damage award.

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[15] Contrary to Dow's assertion, Plaintiffs do not claim that they "merely seek injunctive relief." Dow Br. at 26. Plaintiffs merely pointed out the analogous nature and equitable purpose between an injunction and medical monitoring.

[16] *See* Pankja Venugopol, *The Class Certification of Medical Monitoring Claims*, 102 Colum. L. Rev. 1659 (2002). PR: 98b-131b. The distinction between a damage and an equitable claim takes on particular importance in the context of federal class action litigation. In federal class actions, unlike Michigan class actions, different procedures apply depending on the classification of the underlying action. *Compare* Federal Rule of Civil Procedure 23(b)(2) (for equitable actions) *with* Federal Rule of Civil Procedure 23(b)(3) (for damage actions).

A. Michigan Courts Have Not Characterized Medical Monitoring as a Component of Damages.

Contrary to the assumption underlying Dow's arguments, Michigan Courts have not concluded that medical monitoring is a damage remedy. Dow Br. at 26-27. Indeed, Michigan's courts would likely follow the lead of most other courts and make the legal / equitable distinction based on the characteristics of the specific remedy sought by the plaintiffs in the specific case. If plaintiffs sought a lump sum damage remedy, then the Court would be constrained to rule on a request for lump sum damages, not a court supervised fund.

Dow looks to the Appellate Court's opinion in *Meyerhoff v. Turner Const. Co.*, 202 Mich. App. 499, 509 N.W.2d 847 (1993), *vacated by* 456 Mich. 933, 575 N.W.2d 550 (1994). There the Court stated that plaintiffs sought "damages" for emotional distress and for medical monitoring that the Court described as "quantifiable costs of periodic medical examination" and as "recovering medical monitoring expenses." In other words, the *Meyerhoff* plaintiffs chose to seek a damage award, not, as Plaintiffs do here, a court supervised medical monitoring program. Dow Br. at 11-16.

Dow then analyzes this Court's order in *Meyerhoff v. Turner Const. Co.*, 456 Mich. 933, 575 N.W.2d 550 (1998), which held the factual record insufficient to allow medical monitoring damages and vacated the portion of the appellate court's decision allowing "medical monitoring expenses as a compensable item of damages." This Order does not conclusively characterize a claim for medical monitoring as exclusively a damage claim. Last, Dow cites to *Taylor v. The American Tobacco Co.*, 2000 W.L. 34159708 at *12 (Mich. Cir. Ct. Jan. 10, 2000), which simply reviewed the two *Meyerhoff* decisions and determined that recovery of expenses is a damage remedy and does not support injunctive class action relief under MCR 3.501(A)(2)(b). Dow Br. at 27. This too is not determinative as to whether Plaintiffs here have asserted an equitable claim.

B. Plaintiffs' Claim Is Equitable in Nature Because the Program Would Pay Only for Medical Expenses Relating to Diagnostic Purposes.

The specificity of medical monitoring relief demonstrates its equitable nature. A medical monitoring program, like the one sought by Plaintiffs here, is equitable relief because the fund could only be used for designated diagnostic purposes. It would not pay compensation for dioxin-related illness or injury. Contrary to what Dow argues, Dow Br. at 26, the key factor is not the establishment of a fund, rather it is the specific use for which the fund's assets could be used. *See Day v. NLO, Inc.*, 144 F.R.D. 330, 335 (S.D. Ohio 1992) *vac'd on other grounds* 5 F.3d 154 (6th Cir. 1993). Plaintiffs do not seek a payment to each Plaintiff for medical monitoring costs. That would not constitute equitable relief because there is no control over how an award could be spent. *Id.* at 335. Court supervision ensures the program is used only for medical surveillance. *Id.* at 336. Nor do Plaintiffs request a program that would pay for both medical diagnostic testing and then compensate plaintiffs for detected injuries.

Plaintiffs' medical monitoring claim differs from the personal injury cases relied on by Dow because the remedy is not liquid. An important distinction between an action for damages and an equitable action is whether the monies can be spent by individuals for purposes other than monitoring. Plaintiffs here would not have any vested right in the corpus of the medical monitoring program. There is little incentive for Plaintiffs to submit themselves frivolously to medical examinations and blood tests.

C. Court-Supervision Is An Exercise of the Court's Equitable Powers.

Court involvement in the program's administration through its continuing equity jurisdiction ensures the monitoring program's specificity. *See Day* 144 F.R.D. at 336 (program managed by

court-appointed, court-supervised trustees). Indeed, an equitable court-supervised program is the preferred mode of medical monitoring relief.[17]

D. The Future-Focus of the Medical Monitoring Program Also Demonstrates Its Equitable Nature.

Unlike legal relief, which is mainly oriented on the past, equitable relief, like medical monitoring, looks to the future. The medical monitoring program is future-focused because it intends to prevent or mitigate the possible onset of physical injury or illness resulting from a toxic exposure. The possibility of preventing or mitigating serious illness through regular diagnostic testing is the key justification for medical monitoring relief. *See In re Paoli*, 916 F.2d at 850.

The future focus of medical monitoring results in benefits all around. Plaintiffs benefit from early diagnosis because severe illness may be abated, or at the least detected early enough so that treatment may be more effective, both in cost and outcome. Dow could benefit because monitoring may serve as notice enough to close out claims for punitive damages, and successful treatment in the early stages of disease may reduce future overall damage claims. The State of Michigan and its tax payers benefit by reducing the spillover costs of residents exposed to toxic contamination and latent, undetected illness. While typical mass torts are best served by ordinary legal remedies, mass exposures are not, because preemptive action prevents greater future harm.

VIII. THE CIRCUIT COURT BELOW DID NOT ERR IN LOOKING TO *MEYERHOFF* FOR GUIDANCE.

Dow strains credibility in its overreaching interpretation of the *Meyerhoff* cases. Unsatisfied with the plain meaning of this Court's Orders, Dow seeks to force an unsupported interpretation that

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[17] See *Ayers*, 525 A.2d at 314 (well within court's equitable powers); *Redland*, 696 A.2d at 143-43 n.6; *Potter,* 863 P.2d at 825 n.28; *Hansen*, 858 P.2d at 982 (trial courts have ample equitable powers to create and administer a court-supervised fund); *Burns,* 752 P.2d at 34; *Petito,* 750 So.2d at 106 ("the implementation of and supervision over a medical monitoring fund is well within a court's equitable powers."); *Friends*, 746 F.2d at 830 and n.22 (flexibility of equity balances public interests and private needs).

the Orders preclude a claim for court supervised equitable medical monitoring. Dow concedes that this Court has never undertaken an examination and analysis of medical monitoring claims and has, therefore, never declared whether it is a valid legal theory under Michigan law. Had this Court wished to declare medical monitoring non-existent under Michigan law, it could have done so. It did not. If this Court had desired to comment on whether a current physical injury was necessary for a medical monitoring claim it could have. It did not.

The current confusion in Michigan law on this question arises from this Court's procedural handling of the Court of Appeals ruling in *Meyerhoff*, 202 Mich. App. 499. In that opinion, the Appeals Court held that medical monitoring expenses are a compensable item where the proofs demonstrate that such surveillance to monitor the effect of exposure to toxic substances "is reasonable and necessary." Id. at 505.

The Court of Appeals' rationale in *Meyerhoff* was clear and compelling—companies like Dow, that are responsible for polluting communities with dangerous toxic substances, should be responsible for paying the costs associated with limiting the damages caused by those substances, including the costs for necessary medical monitoring of those exposed to that pollution. The Court of Appeals found numerous "policy reasons for recognizing a claim for medical monitoring damages. First, "[m]edical monitoring claims acknowledge that, in a toxic age, significant harm can be done to an individual by a tortfeasor, notwithstanding latent manifestation of that harm." *Id.* at 504. Second, recognizing medical monitoring "does not require courts to speculate about the probability of future injury; rather, it merely requires courts to ascertain the probability that the less-costly remedy of medical supervision is appropriate." *Id.*

The *Meyerhoff* court went on, finding that allowing "plaintiffs to recover medical monitoring expenses deters the irresponsible discharge of toxic substances by defendants and encourages

plaintiffs to detect and treat their injuries as soon as possible." *Id.* Fourth, permitting "recovery for reasonable presymptom medical monitoring expenses subjects defendants to significant liability when proof of the causal connection between the tortuous conduct and plaintiffs' exposure is likely to be most readily available." *Id.* Last, a "consideration compelling recognition of a presymptom medical monitoring claim is that it is inequitable for an individual, wrongfully exposed to dangerous toxic substances but unable to prove that disease is likely, to have to pay the expense of medical intervention that is clearly reasonable and necessary." *Id.* at 504-05.

This Court originally refused to hear the *Meyerhoff* appeal. *Meyerhoff v. Turner Const. Co.*, 451 Mich. 922, 550 N.W.2d 535 (1996). On reconsideration, this Court vacated its decision to refuse to hear the appeal and said: "Leave to appeal is GRANTED, limited to the issue whether the Court of Appeals erred in recognizing a cause of action resulting in damages for medical monitoring where plaintiff has not yet suffered physical illness or physical injury." *Meyerhoff v. Turner Const. Co.*, 454 Mich. 873, 562 N.W.2d 781 (1997).

After full briefing and oral argument, this Court then vacated its order that had granted leave to appeal, saying in whole:

> Disposition: Leave to appeal having been granted, and the case having been briefed and argued by counsel, the order of March 7, 1997, which granted leave to appeal is VACATED. The factual record is not sufficiently developed to allow a [sic] medical monitoring damages. Accordingly, we VACATE that portion of the Court of Appeals decision which holds that medical monitoring expenses are a compensable item of damages. The circuit court's decision to grant the motion for summary disposition was based, in part, on its having taken judicial notice of certain facts. The Court of Appeals correctly held that the Court should not have taken judicial notice, making the grant of summary disposition improper. Thus, the case is remanded to the circuit court for further proceedings. In all other respects, leave to appeal is DENIED.

Meyerhoff v. Turner Const. Co., 456 Mich. 933, 575 N.W.2d 550 (Feb. 1998) *(emphasis added).* Reconsideration was sought and denied. *Meyerhoff v. Turner Const. Co.*, 456 Mich. 933, 577 N.W.2d 690 (Apr. 1998).

A. Dow Mischaracterizes This Court's *Meyerhoff* Order.

Dow states its own view of what this Court would have said had it chosen to say something substantive in *Meyerhoff,* and misstates the import of this Court's Order. First, although this Court never once commented on current physical illness or injury, according to Dow, this is the entire basis for the Order. Dow initially claims that this Court "rejected" medical monitoring because it was "contrary to longstanding principles of Michigan common law." Dow Br. at 12, 14. Dow later expounds on this vague assertion when it argues that this Court explicitly rejected medical monitoring claims "absent physical illness or injury." Dow Br. at 15. Indeed, Dow goes on to make the purported need for physical injury the cornerstone of its argument.

Second, Dow argues that this Court "rejected" plaintiffs' medical monitoring claims "based on the legal deficiency of the factual allegations in the plaintiffs' pleadings." Dow Br. at 15. Dow goes so far as to assert that this Court "ordered the claim be dismissed" "because the plaintiffs' could not state a claim as a matter of law." Dow Br. at 15. This is manifestly not what this Court ruled in its Order. If this Court had wanted to dismiss for failure to state a claim upon which relief could be granted, it could have done so. It did not.

If this Court had intended to prohibit a claim for medical monitoring it certainly could have done so in a clear and unambiguous manner. Dow places much emphasis on this Court's use of the term "Vacate." "Vacate" means to "nullify or cancel, make void, invalidate . . . [but] *cf* overrule." Black's Law Dictionary (8th ed. 2004). The Court notably did not use the term "overrule," which means "to rule against, to reject . . . . to overturn or set aside (a precedent) by expressly deciding that it should no longer be controlling law." *Id.* This Court may have canceled the Court of Appeals decision in *Meryerhoff,* but it did not overrule it.

B. The Court of Appeals' Opinion in *Meyerhoff* is a Legitimate Source of Guidance to Circuit Courts.

The salient point, however, is that while the Court of Appeals opinion lacks precedential value, it carries persuasive authority. Dow misrepresents the Circuit Court's reliance on the *Meyerhoff* line of cases. The Circuit Court took into account both the Court of Appeals' opinion and that this Court "reversed *Meyerhoff* summarily." Op. and Order: 160a. The most that Dow can accuse the Circuit Court of doing was using the solid logic and observations of the Court of Appeals opinion as a basis for permitting Plaintiffs to create a factual record. This gave the Circuit Court the basis to recognize, at least for now, Plaintiffs' medical monitoring claim.

From the Circuit Court's straightforward Order, Dow makes two complementary, but unsupported, arguments. First, that the Circuit Court "erroneously relied" on the vacated decision. Dow Br. at 11. Other than the citation and block quote, nothing in the Circuit Court's Order demonstrates any reliance on the Appellate Court's decision. The Circuit Court did not cite it as authority, but rather noted its existence. Second, that the Circuit Court "erred by declining to follow this Court's guidance in *Meyerhoff*" and that the circuit court's Order relied upon a "fundamental misinterpretation" of this Court's Order. Dow Br. at 12, 14. Nothing in the Circuit Court's Order, however, indicates any interpretation, right or wrong, of this Court's Order in *Meyerhoff*.

IX. COURTS THAT HAVE THOUGHTFULLY EXAMINED MEDICAL MONITORING CLAIMS SEEKING AN EQUITABLE FUND HAVE ADOPTED MEDICAL MONITORING.

Dow inaccurately attempts to portray the Circuit Court's decision to permit a medical monitoring claim as inconsistent with the generally accepted view of other states. Dow Br. at 34. The case law regarding medical monitoring is numerous and the conclusions varied. There are simply too many opinions on medical monitoring to exhaustively list, classify, characterize, and analyze them all here. Many state courts have not considered relief through a court-supervised fund.

The issue has simply not been placed squarely before them. Those Courts that have examined the issue, or commented on the court-fund form of relief, however, have come out in its favor. These courts also reject the necessity of a current physical injury and find that public policy considerations support the need for medical monitoring. Plaintiffs refer this Court to the jurisprudence of the following states as providing useful guidance and analysis.

California: The California Supreme Court, after reviewing lower court decisions, recognized a claim and affirmed an award for medical monitoring. *Potter,* 863 P.2d at 821-25. The Court first rejected the need for a current physical injury as incompatible with the nature of toxic exposure. *Potter,* 863 P.2d at 822-23. Indeed, the court specifically rejected the identical argument asserted by Dow that any recovery must "be based upon either a present physical injury or a threat of a future injury that is more likely than not to occur." *Id.* at 822. The court then undertook a public policy analysis virtually identical to the one asserted by Plaintiffs here and determined that monitoring is in the public interest. *Id.* at 824. Last, the court suggested that a court-supervised fund was the most effective and efficient way to implement the remedy. *Id.* at 821-25 and n.28.

Pennsylvania: In *Redland,* 696 A.2d at 145-46, the Pennsylvania Supreme Court, relying on *In re Paoli,* 916 F.2d 829 and *In re Paoli,* 35 F.3d 717 (3rd Cir. 1994), recognized a claim for medical monitoring. The court's public policy analysis paralleled that presented by Plaintiffs here. *Redland,* 696 A.2d at 145-46. The court held that the injury from which a medical monitoring claimant seeks recovery is the quantifiable cost of periodic medical examinations necessary to detect the onset of physical harm. *Id.* The court agreed that no physical injury was necessary to bring a medical monitoring claim. *Id.* at 144. The court preferred that plaintiffs recover these costs through a court-supervised and administered trust fund instead of through lump sum damage award because a trust fund compensates only for the costs actually incurred, limiting defendants' liability. *Id.* at 142

n.6. This remains the law in Pennsylvania. See, e.g., *Lewis v. Bayer AG*, 2004 WL 1146692, *15 (Pa. Com. Pl. Mar 19, 2004). PR:9b-28b.

Utah: The Utah Supreme Court in *Hansen,* 858 P.2d at 979-82 (Utah 1993), reversing a grant of summary judgment, recognized a cause of action for medical monitoring. The court first reviewed public policy considerations favoring the creation of a medical monitoring action. *Id.* at 976-77. Noting that because of the "latent nature of most diseases resulting from exposure to toxic substances, however, most toxic-tort plaintiffs cannot establish an immediate physical injury of the type contemplated in traditional tort actions" the court rejected a requirement for a current physical injury. *Id.* at 977-78. The Court then recommended the use of "a court-supervised fund to administer medical surveillance payments." *Id.* at 982.

Arizona: The Arizona Court of Appeals recognized a cause of action for medical monitoring in *Burns,* 752 P.2d at 33-34. The Court first determined that a claim for medical monitoring could be asserted in the absence of a current physical injury. *Id.* at 33. The Court found that if the appropriate evidentiary thresholds are pled and proven then surveillance to monitor the effects of exposure to toxic chemicals is reasonable and necessary and its cost is a compensable item of damages and is consistent with well-accepted legal principles. *Id.* at 33. The Court's public policy analysis, which follows that articulated by Plaintiffs here, also weighed in favor of adopting medical monitoring. *Id.* at 33-34. This Court also favored the utilization of a court-controlled fund to administer medical surveillance payments. *Id.* at 34.

Florida: A Florida court of appeals found that although a lump-sum damage award in anticipation of future medical diagnostic expenses is not recoverable, a court of equity may create and supervise a medical monitoring program. *Petito,* 750 So.2d 103, *rev. denied by* 780 So.2d 912 (Fla. 2000). The court upheld medical monitoring, irrespective of whether plaintiffs suffer physical

injuries. *Id.* at 105-06. The Court also found that allowing the creation of a fund is supported by public policy. *Id.* at 106. Given the restrictive criteria necessary to bring a medical monitoring claim, the court rejected arguments that it would result in a "flood of litigation." *Id.* This remains the applicable law of Florida.[18]

New York: New York was the first state to recognize medical monitoring even when physical injuries were not evident in *Askey v. Occidental Chem. Corp.,* 477 N.Y.S.2d 242, 246-247 (App. Div. 1984). Subsequently two federal district courts in New York have recognized medical monitoring as a cause of action even without a current physical injury. *Patton,* 984 F. Supp. at 673-74; *Gibbs v. E.I. DuPont De Nemours*, 876 F. Supp. 475, 477-79 (W.D.N.Y. 1995). Both cases noted the growing national acceptance of medical monitoring claims.

Illinois: Although no Illinois state court has ruled on the adoption of medical monitoring, two federal courts have concluded that Illinois would adopt medical monitoring as a cause of action. These courts were guided and influenced by the U.S. Third Circuit Court of Appeal's decision in *Paoli*, 916 F.2d 829. *Carey v. Kerr-McGee Chem. Corp.*, 999 F. Supp. 1109, 1119 (N.D. Ill 1998); *Dhamer v. Bristol-Myers Squibb Co.* 183 F.R.D. 520, 523 n.2 (N.D. Ill. 1998).

The vast majority of the cases relied upon by Dow either explicitly or impliedly involved claims for lump sum damage awards. To the extent that these cases failed to analyze or discuss a court fund remedy, they have little relevance here and provide little to assistance to this Court.

For instance, Dow relies on three state court cases to support its position. Dow Br. at 34-36. First, in a somewhat superficial analysis, the Alabama Supreme Court in *Hinton v. Monsanto*, 813 So.2d 827 (Ala. 2001) considered a claim to "recover the costs of medical monitoring;" *Id.* at 828; and never once mentioned a court-controlled monitoring program. The Court's opinion turned

[18] *See, e.g., Perez v. Metabolife Intern., Inc.*, 218 F.R.D. 262, 265 (S.D. Fla. 2003).

solely on the need for some type of current physical injury and relied heavily on the *Buckley* opinion and its analysis of lump sum awards. *Hinton*, 813 So.2d at 830-31.

The Kentucky Supreme Court in *Wood v. Wyeth-Ayerst Labs*, 82 S.W.3d 849 (Ky 2002), although making a passing reference to a "fund;" (*Id.* at 851); never analyzed the fund mechanism in its opinion. That court's opinion reflected a decision to leave the final determination on whether to adopt medical monitoring to the legislature. The Nevada Supreme Court in *Badillo v. American Brands,* 16 P.3d 435, 441 (Nev. 2001), after noting the complexity of the issue and the variance in state decisions, declined to adopt medical monitoring as a cause of action, but left open the issue of whether it was an available remedy. There was no analysis of a court-supervised program or fund.

Other Courts have rejected a claim for medical monitoring damages noting that plaintiffs were apparently unsure of what they were seeking. *See, e.g. Duncan v. Northwest Airlines, Inc.*, 203 F.R.D. 601, 608 n.5 (W.D. Wash. 2001) ("plaintiff is seeking damages, but the contours of the relief requested have been a moving target throughout the litigation"). Although Plaintiffs could expend considerable effort distinguishing each of the many cases cited by Dow, this would constitute wasted effort. The cases relied on by Dow simply do not analyze the issue Plaintiffs present to this Court. By far the majority of courts that have addressed the issue of a court-supervised medical monitoring program have recognized and accepted such a claim as proposed here by Plaintiffs.

X. CONCLUSION

For the reasons set forth by Plaintiffs/Appellees, this Court should recognize an equitable claim for court-supervised medical monitoring. Plaintiffs' claim is consistent with Michigan law, is supported by considerations of public policy, and serves the general welfare.

RELIEF

Plaintiffs respectfully request that (1) the Court adopt medical monitoring as an equitable claim under Michigan law, (2) the Court adopt the standards recommended by Plaintiffs for the claim and (3) this case be remanded to the Circuit Court for further proceedings consistent with this Court's opinion.

Dated: August 31, 2004

Respectfully submitted,

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STATE OF MICHIGAN

IN THE SUPREME COURT

GARY & KATHY HENRY, et al,	)	Supreme Court No. 125205
Plaintiffs,	)	Court of Appeals No. 251234
v	)	Saginaw County Circuit Court Case No. 03-47775-NZ
THE DOW CHEMICAL COMPANY, a Delaware Corporation,	)	Hon. Leopold P. Borrello
Defendant.	)	**PROOF OF SERVICE**

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Teri A. Colpean
TERI A. COLPEAN

Subscribed and sworn to before me this
31st day of August, 2004.

Victoria J Poisson
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Saginaw County, Michigan
My Commission Expires: 10/12/05
Acting in Saginaw County, Michigan